In the Supreme Court of the United States

OCTOBER TERM, 1991

VIRGILIO G. GUERRERO, Storekeeper First Class,
United States Navy, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

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QUESTION PRESENTED

Did the government violate petitioner's constitutional right to due process when it prosecuted him by court-martial for wearing women's clothes without giving him notice that his conduct is prohibited by criminal statutes applicable to military personnel?

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The petitioner, Virgilio G. Guerrero, Storekeeper First Class, United States Navy, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Military Appeals rendered in this proceeding on September 26, 1991.

OPINIONS BELOW

The opinion of the United States Court of Military Appeals, *United States v. Guerrero*, 33 M.J. 295 (C.M.A. 1991), is reprinted as Appendix A.

The opinion of the United States Navy-Marine Corps Court of Military Review, *United States v. Guerrero*, 31 M.J. 692 (N.M.C.M.R. 1990), is reprinted as Appendix B.

JURISDICTION

The United States Court of Military Appeals affirmed the decision of the United States Navy-Marine Corps Court of Military Review on September 26, 1991. 28 U.S.C. § 1259(3) provides jurisdiction in this case and entitles petitioner to seek review of the United States Court of Military Appeals' decision affirming his conviction.

CONSTITUTIONAL PROVISIONS INVOLVED

Article I., § 8, cl. 14:

> The Congress shall have the power . . . to make Rules for the Government and Regulation of the land and naval Forces.

Amendment V:

> No person shall be . . . deprived of life, liberty, or property, without due process of law.

STATUTES INVOLVED

10 U.S.C. § 934, Article 134, Uniform Code of Military Justice. General Article:

> Though not specifically mentioned in this chapter, all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital, of which such persons subject to this chapter may be guilty, shall be taken cognizance of by a general, special, or summary court-martial, according to the nature and degree of the offense, and shall be punished at the discretion of that court.

STATEMENT OF THE CASE

Contrary to his pleas, a court-martial convicted petitioner, an enlisted sailor, of two specifications [1] alleging that he was dressed in women's clothing while in public view. Because no statutory provision prohibits such conduct, the government charged a violation of Article 134, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 934. Petitioner's sentence included a bad-conduct discharge from the naval service. The convening authority [2] approved the sentence as adjudged.

Petitioner does not contest his conviction for the first specification. That specification included behavior committed in the presence of another sailor. He had reasonable notice that the conduct detailed in that specification amounted to criminal misbehavior, because it was prohibited by other provisions in the UCMJ, and a reasonable service person would realize that the UCMJ prohibited such actions.[3]

The second specification gave rise to the due process issue litigated in the lower court. That specification reads:

> In that Storekeeper First Class Petty Officer Virgilio G. Guerrero, U.S. Navy, Fleet Training Center, San Diego, on active duty, a male, was, at or near 2410

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[1] A specification sets forth, in detail, the actual misconduct allegedly committed. *See* Francis A. Gilligan and Frederic I. Lederer, COURT-MARTIAL PROCEDURE § 6-12 (1991).

[2] A convening authority (CA) is an officer empowered to refer charges to court-martial. After trial, the CA must act to approve or limit the sentence, and has discretion to disapprove guilty findings. Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 1107.

[3] *Parker v. Levy*, 417 U.S. 733 (1974), controls the first specification. In *Parker*, the Court held that an army officer (doctor) had reasonable notice that the UCMJ prohibited him from recommending, while treating his patients, that they refuse prospective orders to combat in Vietnam.

> "B" Avenue, National City, California, at various and diverse times during December 1988 to June 1989, wrongfully dressed in women's clothing, to wit: a wig, make-up, mini-skirt and blouse in public view, which conduct was to the prejudice of good order and discipline and of a nature to bring discredit upon the Armed Forces.

The government relied on the testimony of a neighbor who had once seen petitioner through an open curtain dressed as a woman in the privacy of his own home. The manager of petitioner's apartment complex also testified that he had seen petitioner dressed in women's clothing twice, once when petitioner "was passing by one night" and the second, when petitioner had locked himself out of his apartment and asked the manager to use the pass key. Record at 18-20, 28. In each of these instances, petitioner was off duty and away from any military installation.

Petitioner maintains, as he did in the lower court, that he had no fair notice that this behavior constitutes criminal misconduct.

The Navy-Marine Corps Court of Military Review affirmed petitioner's conviction and sentence. *United States v. Guerrero*, 31 M.J. 692 (N.M.C.M.R. 1990) (Appendix B). The Court of Military Appeals granted review on the issues of whether petitioner lacked notice that his acts were criminal, and whether the government violated his fifth amendment due process rights. The Court of Military Appeals affirmed the lower Court's decision. *United States v. Guerrero*, 33 M.J. 295 (C.M.A. 1991) (Appendix A).

In a concurring/dissenting opinion, Senior Judge Everett stated that affirming the conviction on the second specification "expanded Article 134 so far as to raise problems of notice and vagueness." *Guerrero*, 33 M.J. at 299. Senior Judge Everett's dissenting opinion added that "such an overly broad application of Article 134

. . . [invites] the Supreme Court to reexamine its holding [in *Parker v. Levy*, 417 U.S. 733]." *United States v. Guerrero*, at 299.

REASON FOR GRANTING THE WRIT

THE COURT SHOULD GRANT THIS WRIT BECAUSE THE RELEVANT CRIMINAL STATUTE FAILED TO GIVE THIS PETITIONER FAIR NOTICE THAT HIS OTHERWISE INNOCENT CONDUCT WAS PROHIBITED AND RESULTED IN AN ARBITRARY AND CAPRICIOUS PROSECUTION.

The lower court has incorrectly applied *Parker v. Levy*, 417 U.S. 733 (1974), to the facts of this case and has denied petitioner his right to due process of law. In *Parker v. Levy*, the Court held that Captain Parker, who sought to persuade his patients to violate their superiors' orders to combat duty in Vietnam, had reasonable notice that Article 134 proscribed his misconduct. The Court did *not* hold that military personnel are not entitled to reasonable notice that the law treats certain actions as criminal misconduct.

Petitioner recognizes that Congress has much discretion "to make Rules for the Government and Regulation of the land and naval Forces." U.S. Const. Art. I, § 8, cl. 14. However, constitutional safeguards apply to the military except where explicitly or implicitly made inapplicable. *See Parker v. Levy*, 417 U.S. at 766-68 (Douglas, J., dissenting). For example, the Fifth Amendment expressly denies service persons the right to a "Grand Jury." Additionally, the Court has held that the Sixth Amendment right to a jury trial is by implication inapplicable to courts-martial. *See O'Callahan v. Parker*, 395 U.S. 258, 262 (1969).

The issue this case presents is whether military and civilian defendants have the same right to notice required by the fifth amendment's due process clause.

The chief harm propounded by a vague law is that ordinary persons of reasonable intelligence have no notice of what they are prohibited from doing. *Connally v, General Construction Co.*, 269 U.S. 385, 391.[4]

> It is established that a law fails to meet the requirements of the Due Process Clause if it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits or leaves judges and jurors free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case.

Giaccio v. Pennsylvania, 382 U.S. 399, 402 (1966) (citations omitted).

All persons are entitled to be informed as to what the sovereign commands or forbids. *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972). Vague laws cause persons to "steer far wider of the unlawful zone than if the boundaries of the forbidden area were clearly marked." *Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972). *Cf. United States v. National Dairy Products Corp.*, 372 U.S. 29 (1963), *reh'g denied*, 372 U.S. 961, where the Court upheld the Robinson-Patman Act against a vagueness attack.

In *National Dairy Products*, the Court found that the Act's requirement for "predatory intent" helped define price-cutting as prohibited conduct. The intent element made an otherwise innocent act (cutting prices) an action prohibited by law. This element, if proven, would tend to show that one had notice that the law proscribed such misconduct. Article 134, however, requires no similar intent element. Thus, proof of one's otherwise innocent actions provides no similar objective circumstance demonstrating notice.

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[4] "No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes." *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939).

Petitioner concedes that the Court has held that Article 134, while facially broad, is not unconstitutional in all cases. *Parker v. Levy*, 417 U.S. 733 (1974). However, the lower Court's holding has rendered Article 134 unconstitutional as applied to petitioner's conduct.

The lower court's decision also violates the Constitution because the holding offers no explicit standards to those who must apply the law, thus resulting in arbitrary and discriminatory enforcement. "A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis." *Grayned*, 408 U.S. at 108-09. Article 134 can be an arbitrary and discriminate sword in the hands of military commanders who would use it to prosecute military members for any conduct which they, in their sole discretion, deem to be "prejudicial to good order and discipline," or "of a nature to bring discredit upon the armed forces."

This case presents the classic situation where a military convening authority can prosecute a military member under article 134 for any conduct which offends his or her sensibilities. This case also demonstrates Justice Stewart's prescience when he said, "An infinite variety of other conduct, limited only by the scope of a commander's creativity or spleen, can be made the subject of court-martial under these articles." *Parker v. Levy*, 417 U.S. at 779 (Stewart, J., dissenting) (quoting Sherman, *The Civilianization of Military Law*, 22 Maine L. Rev. 3, 80 (1970)).

The Court long ago recognized that the lower Court has construed Article 134 in a manner to partially narrow its broad scope.

> The United States Court of Military Appeals has stated that Article 134 must be judged, "not in vacuo, but in the context in which the years have placed it," *United States v. Frantz*, 2 U.S.C.M.A. 161, 163, 7 C.M.R. 37, 39 (1953). Article 134 does not make, "every irregular, mischievous, or improper act a

> court-martial offense." *United States v. Sandinsky*, 14 U.S.C.M.A. 563, 565, 34 C.M.R. 343, 345 (1964), but its reach is limited to conduct that is " 'directly and palpably—as distinguished from indirectly and remotely—prejudicial to good order and discipline.' " *United States v. Holiday*, 4 U.S.C.M.A. 454, 456, 16 C.M.R. 28, 30 (1954).

Parker v. Levy, 417 U.S. at 752-53.[5]

Nevertheless, the lower Court has now extended Article 134 to areas that the Court never addressed in *Parker v. Levy*. Indeed, Article 134's coverage has been extended to prohibit conduct which reasonable persons would not believe to be illegal, and which in no way implicates good order and discipline in the Armed Forces, or discredits the service.

The lower court's decision in this case has broadened the coverage of Article 134 to include conduct that has no reasonably direct or palpable impact on the military. Petitioner's conduct (wearing women's clothing off base) was not directly related to any legitimate interest of the armed services such that he could justifiably be found guilty. *United States v. Guerrero*, at 298 (Everett, S.J., dissenting). The Court should therefore direct the lower Court to apply *Parker v. Levy*, 417 U.S. 733 (1974), and hold that the statute, as applied in this case, is overly broad and vague, and provided inadequate notice to petitioner that his conduct was criminal.

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[5] The executive branch later concurred with this observation in the 1984 Manual for Courts-Martial:

> Almost any irregular or improper act on the part of a member of the military service could be regarded as prejudicial in some indirect or remote sense; however, this article does not include these distant effects. It is confined to cases in which the prejudice is reasonably direct and palpable.

Manual for Courts-Martial, United States, 1984, Part IV, ¶ 60c (2)(a).

The government has relied upon the unique nature of military society to escape judicial scrutiny. It has become a familiar phrase that the military is a separate and distinct society. Nevertheless, all citizens, civilian or military, are entitled to reasonable notice regarding the rules which govern their lives.

Article 134, as applied and interpreted by this latest decision by the lower court, no longer gives sufficient notice of prohibited conduct. Where could petitioner turn to find out whether his conduct was actionable under article 134? He couldn't look to any federal or state statute. Unlike Captain Parker, his Vietnam era example, he could find no assistance in other military justice codal provisions, nor did custom and tradition place petitioner on notice. As the lower Court noted, the wearing of women's clothing by military members is at times quite common and even encouraged as a means of boosting morale.[6] App. 6a.

If petitioner's conviction stands, the government can arbitrarily and capriciously prosecute individuals who act in ways that while peculiar, bizarre, and eccentric, in no way violate any state or federal law.[7] In this case, petitioner's conduct in no way related to the performance of his duties. In fact, his performance evaluations showed that he consistently performed his duties in an outstanding manner.

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[6] At certain traditional Naval ceremonies such as the "Shellback" ritual, conducted when Naval vessels cross the equator, and chief's initiation upon promotion to Chief Petty Officer, male service persons customarily and routinely don female clothing.

[7] Ironically, a service member who receives a bad-conduct discharge for violating article 134, as petitioner did, may be unable to obtain employment due to his federal conviction. Thus, the former service member would be improperly denied employment. While an employer may choose not to hire one with a federal conviction, the employer might be subject to civil suit for discriminatory hiring practices (in failing to hire one solely because of the belief that he is a transvestite).

CONCLUSION

The lower court's opinion not only failed to apply and follow *Parker v. Levy*, but it greatly broadened the scope of Article 134. The decision in this case has unravelled the fabric of case law which had narrowed a facially broad and vague statute. Therefore the Court should grant certiorari in this case and reverse the lower court's decision.

Respectfully submitted,

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APPENDIX

APPENDIX A

U.S. COURT OF MILITARY APPEALS

No. 65,437

NMCM 90 0160

UNITED STATES,

Appellee,

v.

VIRGILIO G. GUERRERO, Storekeeper First Class, U.S. Navy,

Appellant.

Argued July 9, 1991

Decided Sept. 26, 1991

For Appellant: *Gregory A. Zitani, Esq.* (argued).

For Appellee: *Commander Thomas W. Osborne, JAGC, USN* (argued); *Major Laura L. Scudder, USMC.*

Opinion of the Court

COX, Judge:

Appellant, a male First Class Petty Officer, United States Navy, has been convicted of violating Article 134, Uniform Code of Military Justice, 10 USC § 934. He was acquitted of one specification of soliciting a homosexual act from another sailor, Fireman Recruit Beatty. He was convicted of two specifications alleging that he dressed as a woman under such circumstances as were prejudicial to good order and discipline in the Navy and of a nature

to bring discredit upon the Navy. We are called upon once again to determine whether "cross-dressing" may be the basis for a violation of the Uniform Code of Military Justice. *See United States v. Davis*, 26 MJ 445 (CMA 1988).[1]

Three separate episodes of cross-dressing were consolidated into the two specifications. The first episode arose out of an alleged homosexual solicitation and involved Fireman Apprentice (E-1) Beatty, who at the time of the incident was a Fireman Recruit. Beatty testified he met appellant while shooting pool at the Naval Training Center bowling alley in San Diego, California. Both men were in civilian clothing. After spending some time shooting pool and eating, Beatty said he had to go to the airport and pick up boarding passes for an upcoming trip. Appellant offered him a ride and Beatty accepted.

As they left the bowling alley, Beatty testified that appellant highlighted a sticker on his car. The sticker reflected the pay grade of petty officer, E-7 (appellant had been promoted to Chief Petty Officer and "frocked," thus he could wear the uniform and insignia of a Chief). Beatty asked if he was "a first class petty officer," to which appellant responded, "Don't degrade me." Appellant then handed Beatty his military identification

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[1] Appellant was tried by a military judge sitting alone as a special court-martial. Following his conviction, appellant was sentenced to reduction to pay-grade E-5 and to be discharged from the service with a bad-conduct discharge. The convening authority approved the adjudged sentence. The action by the convening authority effected an "automatic" reduction of appellant to pay grade E-1 pursuant to Article 58a, Uniform Code of Military Justice, 10 USC § 858a. The Court of Military Review affirmed the findings and sentence. 31 MJ 692, 697 (1990).

On April 19, 1990, the Naval Clemency and Parole Board, on its own motion, reviewed appellant's case "for Secretarial clemency and restoration to duty." By an action dated May 1, 1990, the board remitted appellant's bad-conduct discharge in favor of a general discharge.

card, which reflected that he was rated as a chief petty officer.

En route to the airport, Beatty informed appellant that he had recently completed school and was going home before taking his assignment. Returning from the airport, appellant suggested they return to his off-base apartment and do some drinking. Testimony indicates that by this time Beatty was "putting everything together" and suspected appellant was homosexual. At his apartment, appellant poured Beatty a drink of whiskey and withdrew into another room. About 15 minutes later, he emerged dressed "in a long-haired wig, makeup, miniskirt, and a blouse." As Beatty was leaving, appellant said, "I thought you had experienced it. I'll have to show you sometime. Beatty believed appellant "wanted to have sex with him . . . ['c]ause of the way he dressed up."

At the conclusion of the testimony, appellant moved for a finding of not guilty of soliciting a homosexual act. The military judge granted the motion. However, he denied the motion for a finding of not guilty as to the "cross-dressing" offense.

Two other witnesses provided the basis for the conviction of the second "cross-dressing" offense. Radioman Seaman (E-3) Dennis, was appellant's neighbor in an off-base civilian apartment complex. Dennis testified:

> I was opening my windows . . . opening curtains, . . . and he was in his bedroom, . . . right across—directly from mine and he had his wig on or whatever and makeup on.
>
> * * * *
>
> [T]he windows . . . [were about 10 or 15 feet away) evenly levelled out and you just open it up and you could see directly in.
>
> * * * *

He had curtains, . . .

* * * *

They were open.

Dennis complained to the apartment complex manager, retired Master Chief Boiler Technician Sesley, about the behavior as follows:

> I was complaining because it was beginning to be a nuisance, having to look out my curtains and see this going on or whatever, you know, and my wife's in there trying to watch television, and instead of watching television we were watching the window, because they walk right on by, do their thing, whatever.

Master Chief Sesley, who had retired from the Navy after serving for 32 years, was the third witness against appellant. Chief Sesley testified that he also had witnessed appellant dressed in women's clothing on two occasions. The first time appellant was "just passing by one night"; and the second time, appellant appeared at Master Chief Sesley's apartment dressed in a "skirt, wig, [and] makeup" asking for assistance because he had locked himself out of his apartment.

Appellant stipulated that he was indeed dressed in women's clothing on all three occasions. Based on the evidence, the military judge found appellant guilty of the two specifications. He based his findings on the legal principle that the conduct, although "not unlawful . . . under common law or any other statute," was unlawful under "the totality of the circumstances of the conduct of the accused and the military scenario."

Appellant grounds his appeal on two fundamental claims. First, he postulates lack of notice that his acts were criminal; therefore, he asserts a violation of due process as required by the Fifth Amendment to the United States Constitution. Second, he claims that his acts were lawful, did not prejudice good order and disci-

pline, and did not bring discredit upon the armed forces. Thus, the acts cannot form the basis for a criminal conviction.

The violation is charged under Article 134, UCMJ, the "General Article." Paragraph 60, Part IV, of the Manual for Courts-Martial, United States, 1984, requires the following "proof . . . for conviction of an offense under Article 134":

> (1) That the accused did or failed to do certain acts; and
>
> (2) That, under the circumstances, the accused's conduct was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

An accused must be on notice that his conduct is unlawful and that the article fairly informs "that the particular conduct which he engaged in was punishable." *Parker v. Levy*, 417 U.S. 733, 755, 94 S.Ct. 2547, 2561, 41 L.Ed.2d 439 (1974). Admittedly, specifications 2 and 3 are, as described by the court below, "novel." 31 MJ at 696. "Cross-dressing" has not been set out as a violation of Article 134. However, in *United States v. Davis*, *supra*, we examined this behavior in relation to Article 134, reiterating that Article 134 has two categories of proscribed conduct:

> 1—that which is "illegal under the common law or" statutes; and
>
> 2—"that which—however eccentric or unusual" is not unlawful in a civilian community but becomes illegal "solely because, *in the military context, its effect* is to prejudice good order or to discredit the service." *Id.* at 448. For appellant's conduct to be criminal, it must be within the latter category.

We have little trouble agreeing with the Court of Military Review that appellant was on notice that conduct

which is prejudicial to good order and discipline or brings discredit upon the Navy is an offense under Article 134. According to Judge Hilton:

> Considering his status as a chief petty officer and the number of years he had been in the Navy, it is reasonable to assume that he was well aware that there were appropriate standards of civilian attire to which sailors must adhere. We also consider that pursuant to Article 137, UCMJ, 10 U.S.C. § 937, the articles of the UCMJ had been explained to appellant, so that he had "fair notice" that conduct prejudicial to good order and discipline in the armed forces and all conduct of a nature to bring discredit upon the armed forces were punishable.

31 MJ at 696 (footnote and citations omitted).

However, determining whether the specific episodes of cross-dressing were, indeed, unlawful presents a more difficult question, one not easily disposed of under the general rubric of prejudice or discredit. It is difficult because cross-dressing can certainly be non-prejudicial and even enhance morale and discipline. In *United States v. Davis, supra,* we recognized that "a King Neptune ceremony and Kibuki theater" would neither be prejudicial to good order and discipline nor bring discredit. 26 MJ at 449. Indeed, many popular entertainers have successfully portrayed women characters such as Dustin Hoffman's "Tootsie" or Flip Wilson's "Geraldine." Certainly most Americans are familiar with Jamie Farr's character "Corporal Klinger" from the television series, "M.A.S.H.," a show that parodies military life, seen onboard ships and in day rooms throughout the world.

Thus, it is not the cross-dressing *per se* which gives rise to the offense. Rather, it is (1) the time, (2) the place, (3) the circumstances, and (4) the purpose for the cross-dressing, all together, which form the basis for determining if the conduct is "to the prejudice of good

order and discipline . . . or was of a nature to bring discredit upon the armed forces." Para. 60b, Part IV, *Manual, supra. See generally United States v. Davis, supra.* For example, if a servicemember cross-dresses in the privacy[2] of his home, with his curtains or drapes closed and no reasonable belief that he was being observed by others or bringing discredit to his rating as a petty officer or to the U.S. Navy, it would not constitute the offense. *See United States v. Choate,* 32 MJ 423 (CMA 1991). Also, the factfinder must be certain that the prejudice or the discrediting nature of the conduct is legitimately focused toward good order and discipline or discrediting to the armed forces, and is not solely the result of the personal fears, phobias, biases, or prejudices of the witnesses.

We are satisfied from our review of the record that the military judge fully understood these distinctions, as did the United States Navy-Marine Corps Court of Military Review. Furthermore, there is credible evidence of record to support each and every element of the offenses. *Jackson v. Virginia,* 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

The decision of the United States Navy-Marine Corps Court of Military Review is affirmed.

Chief Judge SULLIVAN concurs.

EVERETT, Senior Judge (concurring in part and dissenting in part);

I have no disagreement with the principles of law relied on in the majority opinion. Indeed, I believe the evi-

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[2] *Webster's Ninth New Collegiate Dictionary* 936 (1988) defines "privacy" as follows:

> [T]he quality or state of being *apart from* company or *observation*: SECLUSION . . . freedom from unauthorized intrusion . . . a place of seclusion . . . SECRECY.

(Emphasis added.)

dence supports the conviction of Guerrero for his cross-dressing in connection with the episode involving Fireman Apprentice Beatty, whom appellant had taken home with him. As to the other specification of "cross-dressing," however, the relationship of appellant's conduct to any legitimate interests of the Armed Services was too indirect and attenuated to justify finding him guilty.

The discussion of Article 134 in paragraph 60c(2)(a), Part IV, Manual for Courts-Martial, United States, 1984, states: "Almost any irregular or improper act on the part of a member of the military service could be regarded as prejudicial in some indirect or remote sense; however, this article does not include these distant effects. It is confined to cases in which the prejudice is reasonably direct and palpable." Even though Guerrero had been seen casually by others while he was "cross-dressed," he was away from any military installation and was either in his apartment or in transit to or from it. Under these circumstances, to uphold his conviction—and the sentence to a bad-conduct discharge which was based in part thereon—is not within the contemplation of Article 134.

Indeed, to affirm such a conviction expands Article 134 so greatly as to raise problems of notice and vagueness; and, although I realize that *Parker v. Levy*, 417 U.S. 733, 94 S.Ct. 2547, 41 L.Ed.2d 439 (1974), upheld Article 134 against constitutional attack on such grounds, an overly broad application of Article 134 in cases like this is an invitation for the Supreme Court to reexamine its holding there.

APPENDIX B

U.S. NAVY-MARINE CORPS COURT OF MILITARY REVIEW

NMCM 90 0160

UNITED STATES

v.

VIRGILIO G. GUERRERO, 562 55 5660,
Storekeeper First Class
(E-6), U.S. Navy

Sentence Adjudged 1 Nov. 1989

Decided 16 Aug. 1990

LT Fredric D. Firestone, JAGC, USNR, Appellate Defense Counsel.

LT Wade W. Parrish, JAGC, USNR, Appellate Defense Counsel.

Maj Laura L. Scudder, USMC, Appellate Government Counsel.

Before ALBERTSON, Senior Judge, and JONES and HILTON, Judges.

HILTON, Judge:

Contrary to his pleas, appellant was convicted by a military judge alone sitting as a special court-martial of

two specifications alleging that appellant dressed in women's clothing in public view in violation of Article 134, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 934.[1] He was aquitted of a specification alleging solicitation to commit sodomy in violation of Article 134, UCMJ. The military judge sentenced him to a bad-conduct discharge and reduction to E-5. The convening authority approved the sentence as adjudged, but effectuated the automatic reduction provision of Article 58a, UCMJ, 10 U.S.C. § 858a.

On review, appellant asserts that the military judge erred to his substantial prejudice by denying his motion to dismiss Specification 3 of the Charge, which is the specification describing appellant's wrongfully dressing in women's clothing in public view in June 1989. The basis for appellant's position here is essentially the same as at trial: Appellant had no notice that the acts set forth

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[1] Specification 2 reads:

> Specification 2: In that Storekeeper First Class Petty Officer Virgilio G. Guerrero, U.S. Navy, Fleet Training Center, San Diego, on active duty, a male, was, at 2410 "B" Avenue, Apt. #10, National City, California, on or about 20 April 1989, wrongfully dressed in women's clothing to wit: a wig, make-up, mini-skirt, and blouse in the presence of Fireman Recruit Scott A. Beatty, U.S. Navy, which conduct was to the prejudice of good order and discipline and of a nature to bring discredit upon the Armed Forces.

Specification 3 reads:

> Specification 3: In that Storekeeper First Class Petty Officer Virgilio G. Guerrero, U.S. Navy, Fleet Training Center, San Diego, on active duty, a male, was, as or near 2410 "B" Avenue, National City, California, at various and diverse times during December 1988 to June 1989, wrongfully dressed in women's clothing, to wit: a wig, make-up, mini-skirt, and blouse in public view, which conduct was to the prejudice of good order and discipline and of a nature to bring discredit upon the Armed Forces.

With respect to Specification 3, the military judge found the appellant guilty by exceptions and substitutions of committing the offense in June 1989.

in Specification 3 would be considered criminal, as is required by the Fifth Amendment to the Constitution.

At trial, appellant admitted through a confessional stipulation of fact that he had dressed in women's clothing in public view as alleged in the two specifications of which he was convicted. He vigorously asserted, however, that such conduct was not wrongful, *i.e.*, that none of the acts set forth in the two specifications was conduct prejudicial to good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces. Appellant's dressing in women's clothing was referred to during the trial as "cross-dressing" and that is what we will call it here.

The following is a brief recitation of the factual scenario for Specification 3 of the Charge. In June 1989, appellant was seen attired in women's clothing at or near his off-base apartment. Seaman D., a neighbor of appellant, opened his windows one evening in June 1989 to be greeted by the sight of appellant in his bedroom dressed in wig, make-up, and women's clothing. The curtains of appellant's windows were open and Seaman D. could look directly across into appellant's apartment, the wall of which was 10-15 feet away. Seaman D., who knew that appellant was a member of the armed forces, subsequently complained to the apartment manager. Mr. S., a retired master chief petty officer and the manager of appellant's apartment complex, saw appellant dressed in women's clothing "just passing by one night" in early June 1989. Later in June, Mr. S. saw appellant dressed in a tight skirt, wig, and makeup when appellant came to Mr. S's apartment. Appellant, who told Mr. S. that he was coming from the club, had locked himself out of his apartment and asked the manager's assistance. Mr. S. accompanied appellant to his apartment and using his master key, let him back in. Mr. S. knew that appellant was in the Navy because he had seen him attired in the uniform of a chief petty officer.

Although appellate defense counsel have made no assignment of error with respect to Specification 2 of the Charge, we have set forth the facts because we decided to evaluate whether Specification 2 alleged an offense. The facts relating to the specification are: On 20 April 1989, appellant and FA B, became acquainted as they played a game of pool together at a bowling alley at Naval Training Command (NTC), San Diego, California. Neither man was in uniform. Afterward they had something to eat, and appellant offered to drive FA B. to the airport to pick up boarding passes. In the car, appellant informed FA B. that he was a chief petty officer. FA B. told appellant he was in the military, had recently completed school, and was going home on leave before taking up his assignment in Diego Garcia. On the way to the airport, appellant talked about prostitution and his friends. After picking up the boarding passes, appellant invited FA B. to his apartment for a drink. At the apartment, appellant gave FA B. a drink, put on a movie, and said "Sometimes I crossover." When appellant left the room, FA B. "got his name off a telephone bill" which was on the couch. When asked why he did so, he answered: "Cause I knew something was messed up after he said that to me. I was putting everything together." Fifteen minutes after leaving the room, appellant returned in "a long-haired wig, makeup, miniskirt, and a blouse." When he saw appellant thus transformed, FA B. "got up and headed out the door." As he did so he heard appellant say: "I thought you had experienced it. I'll have to show you sometime." FA B. reported the incident to his command and the Naval Investigative Service.

At the time he committed the offenses for which he was convicted, appellant had been frocked to the rank of chief petty officer (E-7). He had been in the Navy for 9½ years.

In order for there to be a violation of Article 134, UCMJ, it must be proved that:

(1) The accused did or failed to do certain acts; and

(2) Under the circumstances, the accused's conduct was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

The law also requires that an accused must be on notice that his conduct is unlawful, *i.e.*, that the article of the UCMJ in issue, by its language, fairly informs him "that the particular conduct which he engaged in was punishable." *Parker v. Levy*, 417 U.S. 733, 755, 94 S.Ct. 2547, 2561, 41 L.Ed.2d 439 (1974).

As the Court of Military Appeals observed in *United States v. Sandinsky*, 14 U.S.C.M.A. 563, 565, 34 C.M.R. 343, 345 (1964), "the General Article is not such a catch-all as to make every irregular, mischievous, or improper act a court-martial offense." Rather, it is misconduct which is "directly and palpably—as distinguished from indirectly and remotely—prejudicial to good order and discipline." *United States v. Holiday*, 4 U.S.C.M.A. 454, 456, 16 C.M.R. 28, 30 (1954); *see also* Paragraph 60c (2)(a), Part IV, Manual for Courts-Martial (MCM), United States, 1984. There is no requirement that conduct be prohibited by order, regulation or statute for there to be a violation of Article 134, UCMJ. *Sandisky*, 34 C.M.R. at 346.

Article 134, UCMJ, also proscribes service-discrediting conduct, *i.e.*, conduct which has a "tendency to bring the service into disrepute or which tends to lower it in public esteem." Paragraph 60c(3), MCM.

As in *United States v. Davis*, 26 M.J. 445 (C.M.A. 1988), "[t]he essence of appellant's crime is that his unusual conduct . . . had an adverse effect on military order and discipline and created a negative perception of

the armed services."[2] We are satisfied beyond a reasonable doubt from the testimony of the witnesses, and the totality of the circumstances in this case, that appellant's cross-dressing as described in Specifications 2 and 3 was both prejudicial to good order and discipline and of a nature to bring discredit upon the armed forces. Among those matters we viewed as especially significant were that appellant was frocked as chief petty officer in the Navy with 9½ years of service; that appellant's cross-dressing was casual, open, and notorious; that he was known to be a chief petty officer in the Navy by Mr. S. (the apartment manager), Seaman D., and FA B. at the time those individuals observed appellant dressed as a woman; and, that Seaman D. and FA B. were junior to appellant. *See United States v. Hooper*, 9 U.S.C.M.A. 637, 26 C.M.R. 417, 427 (1958).

We also find appellant's contention that he lacked adequate notice of the criminality of his conduct to be without merit. Considering his status as a chief petty officer

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[2] In *United States v. Davis*, 26 M.J. 445 (C.M.A. 1988), the Court recognized situations in which cross-dressing might not be viewed as violative of Article 134, UCMJ, citing Kabuki theater and the King Neptune ceremony. In the case *sub judice*, as in *Davis*, there is no evidence that appellant's conduct was in connection with a theatrical event or traditional service ritual, such as initiation into the Order of the Shellback, where dressing in clothing of the opposite sex is not considered service-discrediting or prejudicial to good order and discipline in the services. Appellant contrasts the facts of the case with those of *Davis* and takes the position that because appellant's cross-dressing did not occur on a military installation and provoke a similarly tangible response within his command, it should not be viewed as misconduct subject to the UCMJ. There was evidence that Davis was aware that his co-workers had refused to work with him because of his cross-dressing, that he had been counseled about it, and that he had been "encouraged to be more discrete." We do not believe the Court handed down a litmus test for when cross-dressing is an offense, but rather decided *inter alia* whether the particular facts in *Davis* established an offense when measured against the elements of an offense under the General Article.

and the number of years he had been in the Navy, it is reasonable to assume that he was well aware that there were appropriate standards of civilian attire to which sailors must adhere.[3] We also consider that pursuant to Article 137, UCMJ, 10 U.S.C. § 937, the articles of the UCMJ had been explained to appellant, so that he had "fair notice" that conduct prejudicial to good order and discipline in the armed forces and all conduct of a nature to bring discredit upon the armed forces were punishable. *United States v. Woods*, 28 M.J. 318 (C.M.A. 1989); *See Parker v. Levy*, 417 U.S. 733, 94 S.Ct. 2547, 41 L.Ed.2d 439.

We next turn to consideration of the matter whether a bad-conduct discharge is an authorized punishment for the offense of wrongfully dressing in women's clothing in violation of Article 134, UCMJ.

Specifications 2 and 3 are "novel" specifications and allege conduct not falling under any of the offenses set out as violations of Article 134, UCMJ, in the Manual for Courts-Martial. In arriving, therefore, at what the maximum punishment ought to be for the offense of wrongfully dressing in women's clothing, the military judge analogized appellant's misconduct to the wearing of unauthorized insignia, decoration, badge, ribbon, device, or lapel button in violation of Article 134, UCMJ, and determined that, like such an offense, appellant's offense of cross-dressing should subject him to the maximum jurisdictional limit of punishment at a special court-martial.

We take a different view. The offense of wrongfully dressing in women's clothing (cross-dressing) is more

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[3] Standard Organization and Regulations of the U.S. Navy (OPNAVINST 3120.32B), paragraph 510.10 titled CIVILIAN CLOTHING provides in pertinent part at subparagraph b, that "When civilian clothing is worn, naval personnel will ensure that their dress and personal appearance are appropriate for the occasion and will not bring discredit on the naval service. Current styles and fashions are authorized."

closely akin to disorderly conduct in violation of Article 134, UCMJ. Disorderly conduct is described as "conduct of such a nature as to affect the peace and quiet of persons who may witness it and who may be disturbed or provoked to resentment thereby. It includes conduct that endangers public morals or outrages public decency and any disturbance of a contentious or turbulent character." Paragraph 73c(2), MCM. The maximum punishment for disorderly conduct under such circumstances as to bring discredit upon the military service[4] is confinement for 4 months and forfeiture of two-thirds pay per month for 4 months. Paragraph 73e(1)(a), MCM.

Turning to the present case, appellant was convicted of two offenses, each of which is punishable by confinement for 4 months . . . and forfeiture of two-thirds pay per month for 4 months. Rule for Courts-Martial (R.C.M.), 1003(d)(3), MCM, provides that "if an accused is found guilty of two or more offenses for none of which a dishonorable or bad-conduct discharge is otherwise authorized, the fact that the authorized confinement for these offenses totals 6 months or more shall, in addition, authorize a bad-conduct discharge and forfeiture of all pay and allowances." The maximum punishment in this case, therefore, includes a bad-conduct discharge since the maximum authorized confinement (absent the jurisdictional limitation of a special court-martial is confinement for 8 months. *Cf. United States v. Timmons*, 13 M.J. 431, 435 (C.M.A. 1982), (where Court found no fair risk of prejudice in the failure of the military judge to instruct the members of the basis for the augmented punishment under paragraph 127*c*, MCM, 1969, the predecessor to R.C.M. 1003d)(3)).

Accordingly, we affirm the findings. We reassess the sentence in view of our ruling on the maximum permis-

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[4] We note that the Government *pleaded* and *proved* appellant's conduct as "service discrediting conduct."

sible punishment, and in doing so, we view as especially egregious appellant's misconduct with respect to FA B., which is the subject of Specification 2. *Id.* We, therefore, conclude that the sentence imposed by the military judge, as approved on review below, is appropriate under all the facts and circumstances of this case and affirm. *United States v. Sales*, 22 M.J. 305 (C.M.A. 1986).

Senior Judge ALBERTSON and Judge JONES concur.

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